



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Via FOIAonline

OFFICE OF
GENERAL COUNSEL

June 3, 2014

Senator John Coghill
Alaska State Legislature
1292 Sadler Way, Suite 340
Fairbanks, AK 99701

Re: Freedom of Information Act Appeal No. EPA-HQ-2014-005624 (Request
No. EPA-R10-2014-005278)

Dear Senator Coghill:

I am responding to the December 20, 2013 fee waiver appeal ("Appeal") under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 made on your behalf by Chad Hutchinson of your office. You appealed the April 9, 2014 decision of Larry Gottesman of the U.S. Environmental Protection Agency ("EPA" or "Agency") to deny your request ("Request") for a fee waiver. You seek a waiver of all fees associated with your FOIA request for a wide variety of records within 15 separate categories.

I have carefully considered your request for a fee waiver, EPA's initial fee waiver denial, and your appeal. For the reasons set forth below, I have concluded that your appeal of your request for a complete waiver of fees should be, and is, denied.

Fee Waiver Standard

The statutory standard for evaluating fee waiver requests is whether "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government; and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

EPA's regulations at 40 C.F.R. § 2.107(l)(2) and (3) establish the same standard. EPA must consider four conditions to determine whether a request is in the public interest ("public interest prong"): (1) whether the subject of the requested records concerns the operations or activities of the Federal government; (2) whether the disclosure is likely to contribute to an

understanding of government operations or activities; (3) whether the disclosure is likely to contribute to public understanding of a reasonably broad audience of persons interested in the subject matter; and (4) whether the disclosure is likely to contribute significantly to public understanding of government operations or activities. 40 C.F.R. § 2.107(l)(2). EPA must consider two conditions to determine whether a request is primarily in the commercial interest of the requester: (1) whether the requester has a commercial interest that would be furthered by the requested documents; and (2) whether any such commercial interest outweighs the public interest in disclosure. 40 C.F.R. § 2.107(l)(3).

Public Interest Prong of the Fee Waiver Test

A requester seeking a fee waiver bears the burden of showing that the disclosure of the responsive documents is in the public interest and is not primarily in the requester's commercial interest. See Judicial Watch, Inc. v. DOJ, 185 F. Supp. 2d 54, 60 (D.D.C. 2002); Larson v. CIA, 843 F. 2d 1481, 1483 (D.C. Cir. 1988). The requester must therefore explain with reasonable specificity how disclosure of the requested information is in the public interest by demonstrating how such disclosure is likely to contribute significantly to public understanding of government operations or activities. Larson, 843 F.2d at 1483. Conclusory statements or mere allegations that the disclosure of the requested documents will serve the public interest are not sufficient to meet the burden. See Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1312 (D.C. Cir. 2003). Furthermore, if the circumstances surrounding this request (e.g., the content of the request, the type of requester, the purpose for which the request is made, the requester's ability to disseminate the information to the public) clarify the point of the request, the requester must set forth these circumstances. See Larson, 843 F.2d at 1483. Finally, requests for fee waivers are evaluated on a case-by-case basis. Judicial Watch, Inc., 185 F. Supp. at 60.

The April 9 decision explained: "You have not expressed a specific intent to disseminate the information to the general public. As a result of you failing to meet the above criteria, accordingly, there is no need to address the remaining prongs of the fee waiver criteria." The decision also advised that your appeal should address all required elements.

I find that you have not met the requirements for Elements 2, 3 and 4 of the public interest prong of the fee waiver standard. Therefore, I find that the denial of your fee waiver request was appropriate since you did not provide sufficient information or reasonable specificity to meet the pertinent requirements for Elements 2, 3, and 4.

Elements 2 and 4

I will consider the second and fourth factors of the public interest prong at the same time. The second factor to consider is the informative value of the documents to be disclosed. 40 C.F.R. § 2.107(l)(2)(ii). The requested documents must be “meaningfully informative about government operations or activities in order to be ‘likely to contribute’ to an increased public understanding of those operations or activities.” 40 C.F.R. § 2.107(l)(2)(ii). The disclosure of information already in the public domain would have no informative value since it would not add to the public’s understanding of government. Id.

The fourth factor to consider is whether the disclosure of the requested records is likely to contribute “significantly” to public understanding of government operations or activities. 40 C.F.R. § 2.107(l)(2)(iv). Disclosure of the information should significantly enhance the public’s understanding of the subject in question as compared to the level of public understanding prior to disclosure. Id.

Your request and your appeal did not address Elements 2 and 4. Your request and your appeal stated that “The public interest is served by this anticipated records disclosure (because it is likely to contribute significantly to the public's understanding of EPA operations and activity). There is no primary commercial interest with this FOIA request.” This simply restates the legal standard and does not meet your burden of demonstrating the second and fourth factors. Any requestor could meet the requirements of Elements 2 and 4 for any document related to an agency action by simply claiming that there is public interest. Were the Agency to find such a statement in support of a fee waiver request sufficient, the Agency would essentially eliminate meaningful consideration of these two elements.

Element 3

A requester seeking a fee waiver must also demonstrate that the disclosure of the requested documents will likely contribute to the public understanding, i.e., the understanding of “a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester.” 40 C.F.R. § 107(l)(2)(iii). The requester's expertise in the subject area and his or her “ability and intention to effectively convey information to the public will be considered.” Id. A general claim that the records are of public interest, without plans for dissemination of the information contained therein, does not meet this element. Larson, 843 F. 2d at 1483 (noting that while the requested information was undeniably of great interest to the public, a showing of interest is not sufficient to satisfy the element).

In your appeal, you stated "Our letter [request] specifically stated: "'The public interest is served by this anticipated records disclosure (because it is likely to contribute significantly to the public's understanding of EPA operations and activity). There is no primary commercial interest with this FOIA request.' In other words: It is our specific intent to disseminate the information to the general public."

You have not expressed a specific intent or concrete plans to publish or disseminate the information requested. See, Judicial Watch, Inc. v. DOJ, 122 F. Supp. 2d 5, 10 (D.D.C. 2000). Direct recitations of the legal standard do not amount to a demonstration that you have satisfied this factor. For example, you fail to specify any specific means of dissemination. In the absence of sufficient information regarding the intended distribution of the records requested and the impact on the public's understanding, you have failed to meet the third element.

Because you have not met the requirements of Elements 2, 3 and 4, I need not decide whether you have met your burden with respect to the commercial interest prong of the fee waiver test, *i.e.*, whether or not the requested information is "primarily in the commercial interest of the requester" (5 U.S.C. § 552(a)(4)(A)(iii)), since the statute requires that both prongs of the test must be satisfied for a fee to be waived or reduced. See Judicial Watch, Inc., 122 F. Supp. 2d at 11.

This letter constitutes EPA's final determination on this matter. Pursuant to 5 U.S.C. § 552(a)(4)(B), you may obtain judicial review of this determination by filing a complaint in the United States District Court for the district in which you reside or have your principal place of business, or the district in which the records are situated, or in the District of Columbia. As part of the 2007 FOIA amendments, the Office of Government Information Services ("OGIS") within the National Archives and Records Administration was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD, 20740-6001; e-mail, ogis@nara.gov; telephone, 301-837-1996 or 1-877-684-6448; and facsimile, 301-837-0348.

Please call Lynn Kelly at 202-564-3266 if you have any questions regarding this fee waiver determination.

Sincerely,

A handwritten signature in blue ink, appearing to read "K. Miller", is written over a light blue rectangular background.

Kevin M. Miller
Assistant General Counsel
General Law Office

cc: HQ FOI Office